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U.S. COURT OF APPEALS

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff - Appellee,

v.

CARLOS PAUL RAMIREZ DUARTE,

Defendant - Appellant.

No. 07-50285

D.C. No. CR-07-00022-JSL-01

MEMORANDUM^{*}

Appeal from the United States District Court
for the Central District of California
J. Spencer Letts, District Judge, Presiding

Submitted February 18, 2009^{**}

Before: BEEZER, FERNANDEZ, and W. FLETCHER, Circuit Judges.

Carlos Paul Ramirez Duarte appeals from the 41-month sentence imposed following his guilty-plea conviction for being an alien found in the United States

^{*} This disposition is not appropriate for publication and is not precedent except as provided by 9th Cir. R. 36-3.

^{**} The panel unanimously finds this case suitable for decision without oral argument. *See* Fed. R. App. P. 34(a)(2).

following deportation, in violation of 8 U.S.C. § 1326(a). We have jurisdiction pursuant to 28 U.S.C. § 1291. We affirm, but remand to correct the judgment.

Duarte contends that his sentence is unreasonable because the district court: (1) failed to consider his mitigating evidence and the factors set forth in 18 U.S.C. § 3553(a); (2) failed to provide an adequate explanation for his sentence; (3) based his sentence on clearly erroneous facts; and (4) created an unwarranted sentencing disparity. We conclude that the district court did not commit procedural error and that Duarte's sentence is substantively reasonable. *See Rita v. United States*, 127 S. Ct. 2456, 2468-69 (2007); *see also Gall v. United States*, 128 S. Ct. 586, 598-602 (2007).

Duarte also contends that the district court deprived him of his right to allocution. This contention fails. *See United States v. Laverne*, 963 F.2d 235, 236-37 (9th Cir. 1992).

Duarte further contends that Special Condition 2 of his supervised release should be vacated because the district court impermissibly delegated to the probation officer the authority to determine the maximum number of non-treatment-program drug tests that may be performed. This contention also fails. *See United States v. Maciel-Vasquez*, 458 F.3d 994, 996 (9th Cir. 2006); *United States v. Stephens*, 424 F.3d 876, 882-84 (9th Cir. 2005).

Next, Duarte contends that Special Condition 5 of his supervised release should be vacated because the district court impermissibly: (1) delegated to the probation officer the authority to make him pay all or part of the costs of drug or alcohol treatment; and (2) disregarded his inability to pay. These contentions are foreclosed. *See United States v. Soltero*, 510 F.3d 858, 864-65 (9th Cir. 2007); *see also United States v. Dupas*, 419 F.3d 916, 922-24 (9th Cir. 2005).

Finally, Duarte requests, and the government agrees to, a remand to correct the written judgment so that it conforms with the district court's oral pronouncement at sentencing that: (1) it would not impose Special Condition 8 of supervised release (which requires Duarte to comply with United States immigration rules and regulations); and (2) it would recommend placement in a Southern California facility. We remand for the limited purpose of correcting the written judgment in these respects. *See United States v. Hicks*, 997 F.2d 594, 597 (9th Cir. 1993).

In accordance with *United States v. Rivera-Sanchez*, 222 F.3d 1057, 1062 (9th Cir. 2000), we also remand to delete from the judgment the incorrect reference to 8 U.S.C. § 1326(b)(2). *See United States v. Herrera-Blanco*, 232 F.3d 715, 719 (9th Cir. 2000) (remanding sua sponte to delete the reference to § 1326(b)(2)).

Duarte's motion for leave to file a replacement supplemental opening brief is granted. The Clerk shall file the brief received on August 11, 2008.

AFFIRMED; REMANDED to correct the judgment.